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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EDWIN RICHARDS,
Plaintiff in Error,

vs.

AMERICAN BANK OF ALASKA, a corporation,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR IN RESPONSE TO BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS.

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San Francisco

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This Court has said in reference to motions of a similar nature to the one at bar that "the rule must be determined by the particular facts in each case as they arise." In order therefore that the Court may be fully advised as to the facts underlying the motion to dismiss and before a determination thereof, we ask that the entire record be considered by the Court. In this regard we beg to call attention to the complaint, which is as follows (Tr., 3-7):

I.

That plaintiff above named is a corporation, duly and regularly organized and existing under

and by virtue of the laws of the State of Washington, and having a place of business and a duly authorized resident agent within the Fourth Judicial Division of the Territory of Alaska.

2.

That at all the times hereinafter mentioned Edward Williams and Edwin Richards *were a mining co-partnership,* engaged in business in the Iditarod district of the Territory of Alaska, under the firm name and style of Richards & Williams.

3.

That on or about the month of September, A. D. One thousand nine hundred ten, plaintiff above named, at the special instance and request of defendants above named, loaned to defendants a sum in excess of thirty-five hundred dollars ($3500.00), which said sum defendants promised and agreed to repay to plaintiff, and thereafter and on or about the twenty-fourth day of February, A. D. One thousand nine hundred eleven, said defendants, in consideration of the moneys theretofore loaned to them by plaintiff herein, made, executed and delivered to plaintiff herein their certain promissory note, in the words and figures following, to wit:

Iditarod, Alaska, Feb. 24, 1911.
$3500.00.

On or before July 11, 1911, after date, *I* promise to pay to the order of American Bank of Alaska, at its office in Iditarod, Alaska, Thirty-five hundred 00-100 Dollars for value received, with interest after date at the rate of Twelve per cent. per annum until paid. Principal and inter-

est payable only in U. S. Gold Coin of the present standard of weight and fineness. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest and notice of non-payment thereof, binds himself thereon as a principal, not as a surety, and promises, in case suit is instituted to collect the same or any portion thereof, to pay such additional sums as the court may adjudge reasonable as attorney's fees in such suit.

(Sgd.) RICHARDS & WILLIAMS,
By EDWARD WILLIAMS.
(Sgd.) EDWARD WILLIAMS.
(Sgd.) EDWIN RICHARDS.
By EDWARD WILLIAMS,
His Attorney in Fact.

4.

That said note is past due and no part thereof has been paid, and the whole thereof, both principal and interest, is now due, owing and unpaid from defendants to plaintiff herein.

5.

That plaintiff has been compelled to, and has, employed attorneys to institute and prosecute this action for said sum, and has become liable to said attorneys for reasonable attorneys' fees, and plaintiff is informed and believes and so alleges that the sum of seven hundred fifty dollars ($750.00) would be a reasonable sum to be allowed to its attorneys for their services in said action.

For a second and further separate cause of action against defendant and in favor of plaintiff, plaintiff alleges as follows, to wit:

1.

That plaintiff above named is a corporation, duly and regularly organized and existing under and by virtue of the laws of the State of Washington, and having a place of business and a duly authorized resident agent within the Fourth Judicial Division of the Territory of Alaska.

2.

That at all the times hereinafter mentioned, Edward Williams and Edwin Richards *were a mining copartnership,* engaged in business in the Iditarod District of the Territory of Alaska, under the firm name and style of Richards & Williams.

3.

That on and prior to the sixteenth day of September A. D. One thousand nine hundred eleven, and within one year prior thereto, plaintiff above named, at the special instance and request of defendants herein, permitted said defendants to overdraw their account at the bank conducted by plaintiff in Iditarod, Alaska, in the sum of three hundred twenty-seven and 96/100 Dollars ($327.96), which said sum defendants promised and agreed to repay to plaintiff on demand.

4.

That plaintiff has demanded the payment of said sum, but to pay the same defendants have failed and neglected and do now fail and neglect.

5.

That there is now due, owing and unpaid from defendants to plaintiff the said sum of three hundred twenty-seven and 96/100 dollars ($327.96), together with interest thereon at the rate of eight per centum per annum from the sixteenth day of September, A. D. One thousand nine hundred eleven, to date.

Wherefore, plaintiff prays judgment against defendants above named, and each of them, and against the copartnership of Richards & Williams, as follows, to wit:

1.

On its first cause of action, for the sum of thirty-five hundred dollars ($3500.00), together with interest thereon at the rate of twelve per centum per annum from the twenty-eighth of February, A. D. One thousand nine hundred eleven, to date, together with an attorneys' fee in the sum of seven hundred fifty dollars ($750.00).

2.

On its second cause of action, for the sum of three hundred twenty-seven and 96/100 dollars ($327.96), together with interest thereon at the rate of eight per centum per annum from the sixteenth day of September, A. D. One thousand nine hundred eleven, to date.

3.

For costs of suit and for such other and further relief as to the court shall appear meet, just and equitable in the premises.

The second cause of action was at the trial dismissed (Tr., 12).

To this complaint the plaintiff in error alone answered denying all of the allegations save the corporate existence of the Bank (Tr., 8-9).

The defendant Willams *never made any appearance or answer.* The case was tried three times and not until about the close of the third trial was his *default* entered by the Bank (Tr., 17-244). See also copy of certificate of Clerk of District Court, Territory of Alaska, for the Fourth Division, hereto attached (Marked Exhibit "A"), original of which has been filed in the office of the Clerk of the Circuit Court of Appeals, showing the conditions with reference to the failure of Williams to take any action.

The defendant Williams came voluntarily nearly one thousand miles (Tr., 135) to testify against his co-defendant Richards and was the principal witness for the plaintiff Bank.

At the risk of trespassing upon the patience of the Court, and notwithstanding the criticism of counsel of our statement of facts in opening, we reiterate that the following facts were developed at the trial and a careful reading of the transcript will disclose the same, to wit:

Edward Richards had mined on quite a large scale on Dome Creek near Fairbanks for several years, and in 1908 went into the Hot Springs District and commenced mining operations with a large plant and

machinery on Cache Creek, where he had an interest in some twenty claims (Tr., 192), and was still working them at time of trial. He was a man of good financial reputation and his standing was excellent with the banks (Tr., 163, 171). Prior to going down from Dome Creek, Williams, whom Richards had known in Dawson, had been employed by him on Dome Creek for a year or more (Tr., 60, 192). He was a sort of general hanger on around Richards, doing the cooking when Richards had men enough without his mining and mining otherwise. When Richards went to the Hot Springs, Williams followed him down and worked for him, chiefly at cooking, during the summer of 1909 (Tr., 22, 61, 191-2). At this time Richards was working a lay over on Cache Creek, but going out in the fall, turned the lay over to Williams and a man by the name of Johanson, together with the plant, the stuff in the mess house, etc., and left them some little credit at the store. The result of this lay was disastrous, as when they quit in August, 1910, they owed Richards six or seven hundred dollars, which was a dead loss to the latter (Tr., 62-3, 192). In the spring of 1910, Richards returned to Cache Creek but was hurt and spent a good part of the summer at the hospital and at Gibbon, but when he got back to Cache Creek he lived at the same mess house as Johanson and Williams, and had a cabin close by. There was a phone theretofore paid for by Williams and Johanson, but when Richards

came he used it and paid his share of it, but there was no partnership of any kind claimed between them (Tr., 63, 193). In the spring of 1910 Williams was in correspondence with a man by the name of Boulton, who owned a half interest in a lease on Flat Creek, in the Iditarod country, a distance of about 1100 miles from the Hot Springs country. Williams and Boulton had been old-time friends and partners in Dawson (Tr., 60, 61). Boulton represented to Williams that he had a lay and was having trouble with his partners and wanted Williams to come down and buy a quarter interest in it. Boulton knew that Richards had money and Williams admits that he may have told Boulton that. In any event, Williams spoke to Richards about this lease when Richards returned to Cache Creek in 1910 and they had some talk of no particular importance about it. Later, in September, 1910, a telegram came from Boulton, addressed to Richards at Hot Springs, to "send $2000 at once through N. C. fifty thousand at stake. Freeze out game, don't fail to see letter" (Tr., 69, 196). It was phoned to Richards at Cache Creek. Richards showed the telegram to Williams with the statement that he didn't think it was meant for him and that it must have been for Williams. This letter referred to was afterwards received by Williams, being addressed to him, and was forwarded to the Iditarod (Tr., 70). But they discussed the matter and Richards said he could not go down or send any money down, and

didn't want anything to do with it, but being desirous that Williams should have a chance, asked Williams if he would like to go, who responded "what was the use of talking, he had no money" (Tr., 71, 197). To which Richards replied, "Well, if you think you could do yourself any good by going down there I would give you the money to go down." Williams was only too glad of the opportunity. In a day or two Richards and he went to Hot Springs and Richards gave Williams some $2500, a $2300 check and $200 in currency (Tr., 73, 200).

Williams testified that he then went immediately to the Iditarod; that he had no understanding whatever with Richards that he was to go down there and buy the quarter interest from Boulton and take an assignment in the name of himself and Richards; that he had no verbal or written contract with Richards that he would go down there, buy into that lease on Flat Creek for the benefit of himself and Richards, or that they would mine there as mining co-partners that summer. There was nothing said about a co-partnership or a co-partnership name or that he was to put the money Richards gave him in the name of a partnership of Richards and Williams or about dividing profits and losses, but he was to go down there and use his judgment about buying. In fact, he testified that he expressed his appreciation to Richards in giving him the money to go, saying that he would

do the right thing in return, and went (Tr., 78-9-80-81).

Richards charged Williams up in his private books in a personal account standing in Williams' name for the $2500.00 advanced, and for the moneys paid for the boatman who took Williams to Gibbon on the way to the Iditarod. This was outside of the account standing on Richards' books in the name of Williams and Johanson regarding the money they owed him on the lay which had proved a failure (Tr., 228).

Notwithstanding this, Williams went to the Iditarod and first deposited the money with the Miners & Merchants Bank in his own name (Tr., 81-85). He met Boulton, found he was having trouble with his then partners, Shively and Kennedy, who owned half of the lay, and he bought half of Boulton's interest, or a quarter of the whole lay, at $2000. Boulton wanted him to buy out the other two and he decided to do so (after going out and looking over the ground) at a cost of $4500. It then became necessary to raise the extra money. He could not get it at the Miners & Merchants Bank where he had deposited the $2300 in his own name. Nor did he offer there to get the money on a paper signed Richards & Williams (Tr., 87). But he went to a man by the name of Morgan who knew Richards, told him what he wanted; that he had no power of attorney from Richards but he would like to make a loan and *considered* Richards his partner. Then Morgan introduced him

to Hurley, president of the plaintiff, and he told Hurley the same thing.

Hurley knew Richards by sight, and knew he was a man of means, employed people and responded to all his obligations, although he had never heard or known of Williams when he came to the Bank, and testified he would not lend him any money (Tr., 71-5). But upon Williams' statement that Richards was his partner (and without wiring or writing Richards, or making any inquiries to establish the fact) he loaned Williams $3500, which was placed to his credit under the name of Richards & Williams. Prior to this, Williams had taken the money Richards had loaned him, from the Miners & Merchants Bank, and deposited it with the plaintiff under the partnership name of Richards & Williams. This at Hurley's suggestion (Tr., 32). A note was made payable in ninety days, dated October 6, 1910, signed *"Richards & Williams by Ed. Williams"* (Tr., 34). The Bank never notified Richards of the making of this note in any way. Hurley advised Williams to notify Richards, which the latter did, fairly describing the transaction (Tr., 39), which letter Richards received on December 7th, to which he replied in effect, denying Williams' right to sign his name to the note and more or less upbraiding him for doing so (Tr., 44). Later, Richards wrote a letter dated December 16th, severely criticizing the action of Williams in signing his name to the note, one sentence in which was to

the effect that he (Richards) "would not be responsi-
" ble for any note, check or any other written instru-
" ment to which Williams might have signed or
" should sign his name to in the Iditarod Country."
This letter was proven by the defense to have been destroyed by Williams, but the contents were shown beyond all question by Richards (Tr., 204), and admitted by Williams (Tr., 96, 97, 115, 116, 117). Richards wrote another letter couched in milder language on December 26th, 1910, but along the same general lines (Tr., 51). Williams received these letters in the Iditarod in the latter part of January, 1911 (Tr., 99), and informed Hurley of at least a portion of their contents. From the time that the note of October 6, 1910, became due and payable in January, 1911, Hurley was constantly pressing payment up to the making of the note of February 24, 1911, sued on in this action. Williams had informed Hurley that Richards did not want to stay in the transaction and that he would have to get other partners (Tr., 101), and Hurley was aware that he was negotiating and did finally make a sale of a half interest to two men by the name of McKenzie and McLellan (Tr., 124), retaining a quarter interest.

On February 24, 1911, Hurley insisted on the giving of the new note which was introduced in evidence and was signed differently than as pleaded, being signed personally by Williams, who then signed Richard's name by himself as attorney and then as an after-

thought "By Edward Williams, Richards & Williams" (Tr., 56). In this respect we call the Court's attention to the note of October 6, 1910 (Tr., 34-5), where the signature is "Richards & Williams per Ed. Williams." Hurley also required the making of a mortgage on the three-quarter interest in the lease. He had Williams send a blank bill of sale to Richards, by which the latter conveyed to Williams all his interest, if any, in the lay, with the understanding on the part of Hurley and Williams that if a new note was executed and a mortgage covering the three-quarter's interest in the lay, that when the bill of sale came back from Richards, Richards should be released from all responsibility (Tr., 102-3-4). The new note, and mortgage to secure it, were made as between Edward Williams and Edwin Richards *individually,* as parties of the first part, and American Bank of Alaska, as the second party (Tr., 105). It was distinctly understood by Hurley at the time of the making of this new note and a mortgage to secure it, that Williams had no power of attorney or any written authority to act for Richards or sign his name and discussion was had relative to the fact (Tr., 180). Counsel was taken with attorneys and it was finally decided that Williams should sign his name and Richards' name by himself as attorney in fact, notwithstanding that Williams had no power of attorney, Hurley remarking that it wasn't business, but he would take a chance on it (Tr., 88-89; 180-181). The note

and mortgage were then executed in that form (Tr., 31, 88-89, 166-7, 180-181).

When Williams purchased the interest of Shively and Kennedy at the time of obtaining the $3500 on the first note, he took the assignment of the interest in the name of Williams & Richards, but making a note to Kennedy for a part of his payment (some eight hundred dollars), he signed his own, not Richards' name (Tr., 91-2). There were some moneys owing by Kennedy and Shively, and Williams paid a part of the purchase price in checks to various people, and he did not sign Richards' name or any partnership name to these checks, but signed his own. He bought a boiler for $2100 to be used in working the lay, paying $700 cash to one Tom Aitkin, and gave a note in his own name to Aitkin for the balance. In fact, never signed any notes in the name of Richards or of the alleged partnership, other than the original note of October 6th, and the note of February 24th in suit (Tr., 92-3), which it appears was done solely on the suggestion of Hurley. The evidence shows both from the testimony of Williams and his correspondence with Richards that he was very apprehensive about the result of his making these notes in Richards' name and his lack of authority to do so. As he testified, he felt that he had placed himself in a very delicate position (Tr., 118-131). The Bank never notified Richards at all of the making of the first note, although Hurley testified that it was entirely "on the

strength of the statement made by Williams that Richards was his partner and upon the strength of Richards' name" that the money was loaned (Tr., 173-189). And Richards never knew or heard that the assignment of the three-quarter interest in the lease was taken in his name, together with that of Richards, until May, 1911, when he received the blank quit-claim deed to execute, reconveying to Williams, with a request that he sign it and send it back, which he did (Tr., 228). This was the letter of April 4, 1911 (Defendant's Exhibit 2) (Tr., 124), wherein he was told that if he would sign and send this bill of sale back, conveying to Williams, he would be released of all obligations, and in which letter Williams said, *"If you want some security for the money you gave me I can give you the quarter interest which I still hold"* (Tr., 125).

During the summer of 1911, mining operations were carried on on quite an extensive scale on the lay on Flat Creek by a co-partnership composed of Williams, Boulton, McLennon and McKenzie, and there was no claim whatever from anybody that Richards had any more to do with these operations than had the Czar of Russia or the Kaiser Wilhelm. During the summer of 1911, the plaintiff collected large sums of money from that outfit (Tr., 184-187). The clean-ups were pretty good until August and the firm had deposited gold dust to meet their checks at the Bank to the extent of possibly fifty thousand dollars, and

when the mine closed down, there was an overdraft of some three hundred odd dollars (Tr., 186-187), the amount of the second cause of action dismissed (on second thought by the Bank), as the evidence conclusively showed that Richards never had anything to do with these mining operations at Flat Creek or at any other point in the Iditarod District.

So far as the note of February 24, 1911, is concerned, Richards never heard of this note until he received a letter which was written by the Bank some time in October and received by him on December 28, 1911, at San Francisco. This letter was ruled out as well as the reply of Richards thereto, written four days later and dated January 2, 1912, in which he expressed his surprise and repudiated the note in unmistakable terms (Tr., 206-208). Later, in the year 1912, he was in Fairbanks and went to the Bank and again repudiated the note (Tr., 211). This Hurley also admits (Tr., 245).

Upon this evidence the jury rendered a verdict for the Bank in the full face of the note against Edwin Richards and Edward Williams as Richards & Williams, a copartnership, *and the defendant Richards,* and with no interest but with attorneys' fees (Tr., 15). Upon which verdict the Court rendered the following judgment:

". . . It is ordered, adjudged and decreed:

1. That the plaintiff have and recover from

Edwin Richards and Edward Williams, copartners as Richards & Williams, and from the defendant Edwin Richards, *as an individual,* the sum of Thirty-five hundred dollars ($3500.00), together with an attorney's fee in the sum of seven hundred and fifty dollars ($750.00) ;

2. That plaintiff have and recover from the defendant Edward Williams, *as an individual,* the sum of thirty-five hundred dollars ($3500.00), *together with interest thereon from February 24, 1911, to date, at the rate of twelve per cent. (12%) per annum, amounting to the sum of Thirteen hundred twelve, and 50/100 Dollars,* and an attorney's fee in the sum of Seven hundred and fifty dollars ($750.00) ;

3. That the plaintiff have and recover from the defendants, Edward Williams and Edwin Richards, copartners as Richards & Williams, and Edwin Richards, and Edward Williams, as individuals, the costs of this suit, to be taxed by the clerk; and

4. That the attachment lien of plaintiff on property of the defendant Richards be foreclosed and the property so attached sold by the United States Marshal in the manner prescribed by law, and the net proceeds thereof, or as much thereof as may be necessary, applied by said United States Marshal as a payment upon the judgment above rendered."

In short we have a judgment against the alleged partnership, Richards & Williams, and Richards individually and a separate judgment against Williams individually, the judgment against the latter differing

materially in amount from that against the former.

In addition there is a judgment that the attachment theretofore placed on the individual property of Richards be sold and proceeds applied to the payment of the judgment.

As a matter of fact, certain of the property belonging to Richards, so attached, was thereafter sold upon execution as shown by a certified copy of the execution and return of the United States Marshal filed with the Clerk of this Court, marked "Plaintiff in Error's Exhibit B," on the motion to dismiss.

In due course the writ of error was allowed to Richards, citation issued, transcript printed and case set down for hearing for the October term, 1914; was continued until the May calendar, 1915, but before the hearing and *just* fifteen days *after* the year allowed for the taking of an appeal had expired (and within which if the motion were well taken, the plaintiff in error might have remedied his appeal) the motion to dismiss was filed, no readiness having been shown on behalf of defendant in error to meet the case on the merits by the filing of a brief.

To realize the attitude shown by the non-appearing defendant Williams on the trial it is necessary that the Court read the record before passing on the motion to dismiss. To have asked Williams to join in this appeal would have been futile and the law does not require a useless act. Showing how futile it would be, since the filing of the motion, said Williams made

and caused to be filed with the clerk of the Circuit Court of Appeals, marked "Plaintiff in Error's Exhibit C" on the motion to dismiss, the following statement:

In the United States Circuit Court of Appeals, for the Ninth Circuit.

Edwin Richards, Plaintiff in error, vs. The American Bank of Alaska, a corporation, Defendant in error. —No. 2440.

STATEMENT AND DECLARATION BY DEFENDANT, EDWARD WILLIAMS.

I hereby certify and declare that I was one of the defendants in an action at law lately pending in the District Court for the Territory of Alaska, Fourth Judicial Division, sitting at Fairbanks, which said action was numbered 1815 on the records of the said court, and was entitled as follows: The American Bank of Alaska, a corporation, Plaintiff, vs. Edward Williams and Edwin Richards, mining co-partners engaged in business under the firm name and style of Richards and Williams, and Richards and Williams, a mining co-partnership, Defendants." That said action was tried three times in the said court and passed into a judgment on the 20th day of April, 1914, the said judgment being against Richards and Williams, as co-partners, and included also a separate judgment against defendant Edwin Richards, for the

sum of $250.00, and the costs of the case, and a judgment against myself for $5562.50, and all the costs of the case to be taxed by the clerk; that in said action an attachment was issued at the commencement thereof and was levied on the real and personal property belonging to the defendant Edwin Richards, which said attachment lien was foreclosed in and by said judgment, and the said attached property ordered sold;

That in the said action No. 1815, I had no attorney at any of the three trials thereof in the said District Court, but made default, and at each of the said three trials went upon the stand and was the principal and material witness on behalf of the plaintiff Bank on all of the issues of the said case as made by the plaintiff's complaint and the separate answer of the defendant, Edwin Richards; that at the trial of the said cause, and especially at the last trial thereof, *I made no effort to prepare the record for review so far as I was connected therewith, and in that manner waived and released any and all errors that the court may have committed as against myself, if any were committed, and I do now and here waive and release any and all errors that may have been committed by the court during the progress of the last trial, or of any of the trials of the said cause as against myself; that had the defendant, Edwin Richards, notified me of his purpose and intention to prosecute a writ of error in the said Court of Appeals from the said judgment with a request that I join him therein, I*

would have refused to have so joined, and have never at any time had any wish or desire either to join the said Richards in his writ of error or to prosecute one separately on my own behalf; that I respectfully ask the United States Court of Appeals, for the Ninth Circuit, to pass upon the merits of the said writ of error, without any reference to any supposed rights I may have ever had in connection with the said action, No. 1815, and the records and proceedings therein.

Dated at Tafty, Alaska, June 9, 1915.

EDWARD WILLIAMS. (Italics ours.)

Witnesses to signature:
GEO. A. COLBURN.
ALEXANDER FOWLER.

United States of America,
Territory of Alaska—ss.

Be it remembered that on this 9th day of June, 1915, before me the undersigned, personally appeared Edward Williams, known to me to be the identical person who signed the foregoing statement and declaration, and acknowledged to me that his signature thereto was his genuine signature and that he signed the same voluntarily for the uses and purposes therein set forth and indicated.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this 9th day of June, 1915.

C. P. SNYDER,
Notary Public in and for the Territory of Alaska.

Note:—The $5562.50 referred to in said statement is the amount of the note, interest and attorney's fees.

ARGUMENT.

On the oral argument we advanced as one of the reasons why the appeal should not be dismissed the fact that the defendant Williams had constructive notice by reason of the allowance in open Court of the writ of error.

The judgment was rendered in open Court on the 20th of April (Tr., 19-20). The day after, April 21st, the petition for the writ and assignments of error were filed (Tr., 273-289) and an order was made *in open Court* on the same day allowing the writ of error *and entered in the Journal of the Court's proceedings on that day* (Tr., 289-290). Bond filed and writ of error and citation issued on May 2, 1914, returnable June 1, 1914 (Tr., 20-294), an order made in open Court and entered in the Journal of the Court's proceedings as of that day enlarging the return day to August 1, 1914 (Tr., 295-6), all at the same term of Court.

The appeal was finally perfected by the filing of the transcript of record in this Court on June 30,

1914, which completed the jurisdiction of this Court over the subject-matter of the appeal.

We submit that did the same rule prevail in law actions as in equity, that Williams would be bound by the rule of constructive notice of the proceedings at the time of the allowance of the writ of error, and no citation would be necessary, as a citation is simply intended as notice that an appeal has been taken and will be duly prosecuted.

Dodge v. *Knowles,* 114 U. S., 436, 439, Vol. 29 L. Ed., 296;

Chicago & P. R. R. Co. v. *Blair,* 100 U. S., 585, Vol. 25, 287;

Brown v. *McConnell,* 124 U. S., 489; 31 L. Ed., 444;

Foster's Federal Practice, Vol. III, Sec. 505, p. 2056;

King v. *Thompson,* 116 Fed., 319 (C. C. A.);

Swift & Co. v. *Kortrecht,* 110 Fed., 328 (C. C. A.);

Jos. H. Rice Co. v. *Libbey,* 105 Fed., 825 (C. C. A.);

Kidder v. *Fidelity Ins. Trust & S. D. Co.,* 105 Fed., 821;

McNulta v. *West Chicago Commrs.* 99 Fed., 328 (C. C. A.);

Taylor v. *Leesnitzer,* 220 U. S., 89-90, 55 L. Ed., 382.

We cite these cases in explanation of our reasons

for urging upon the oral argument a point which we must now reluctantly cease to urge if the case of *United States* v. *Philips,* cited by counsel for defendant in error, is, as we assume, decisive of the question that there can be no constructive notice of appeal in law cases to defendants in error.

We contend, however, that there is no merit in the motion to dismiss for the reasons:

1st: That the judgment is not joint, but several;

2nd: The defendant Williams has waived all right to sue out a writ of error and the time has expired within which any such writ could be sued out.

Therefore, the reason for the exercise of the rule prayed for in the motion to dismiss does not exist and its exercise would work an unwarranted hardship on the plaintiff in error.

First. The rule which requires the parties to a joint judgment, or decree, to join in an appeal therefrom, or to be severed by some proper proceeding, is well settled. We do not dispute this principle of procedure but the rule is only applicable to joint judgments and where the interest of one of the defendants is separate from his co-defendants, he may appeal or sue out his writ of error without joining or severing the latter.

Winters v. *U. S.,* 207 U. S., 574; 52 L. Ed., 340;

Todd v. *Daniel,* 16 Pet., 521; 10 L. Ed., 1054;
Henrick v. *Patrick,* 119 U. S., 156; 30 L. Ed., 396;
Forgay v. *Conrad,* 6 How., 201;
Brewster v. *Wakefield* (U. S.), 16 L. Ed., 301;
City Nat'l Bk. etc. v. *Hunter,* 129 U. S., 537; 32 L. Ed., 753;
Germain v. *Mason,* 12 Wall., 259-261; 20 L. Ed., 392.

In the case last cited it was held, quoting the syllabus:

> "A defendant who has a separate, distinct, personal judgment against him for *money,* in which the other defendants have no interest, has a right to prosecute a writ of error in his own name without joining them."

This latter condition we claim exists in this case. An examination of the judgment shows that it is distributive in its character.

There is a judgment against Richards and Williams described as partners and Richards individually in a specified sum to wit: $3500 and $750, attorneys' fees; a judgment against Williams as an individual in an entirely different amount comprising the full amount of the note with interest and an attorneys' fee, without any reference to the fact that there is also a distinct provision in the judgment that the attachment lien on Richards' property shall be foreclosed, and a judgment for costs against both Rich-

ards and Williams described as co-partners and also individually for costs (which latter provision for the purposes of this motion is immaterial). *Higbee* v. *Chadwick,* 220 Fed., 873.

The contract sued upon on its face is joint and several.

This being so, why the needless efforts of counsel to urge upon the Court that under Section 325 of the Code of Alaska (presumably Carter's Code, now Section 754 of the Compiled Laws of Alaska of 1913), the members of a limited partnership are jointly and severally liable for its debts?

The language of the note is "I promise to pay," followed by the individual signatures of Williams, Richards (by Williams) and the partnership name by Williams. Where such is the case the rule is elementary that the promise is joint and several. That is, joint because all unite in one promise and each severally undertakes, and the facts in this record show the note was intended to be the personal note of the parties. The first note given to the Bank by Williams was signed by the alleged firm name only. And the judgment prayed for is against "each of the defendants and against the co-partnership, Richards and Williams."

Counsel besides overlooking this very obvious proposition of law in their efforts to show a joint and several liability are apt to mislead the Court by a failure to call its attention further to the fact that "limited partnerships" under both Carter's Code and the Com-

piled Laws of Alaska of 1913 (Secs. 723 *et seq.*), are those formed for the transaction of "mercantile, mechanical or manufacturing business" and do not include a *mining* partnership as pleaded in this case; besides requiring the filing of a formal certificate of partnership, etc. Therefore Section 325 of Carter's Code can have no bearing whatever on this point.

The conditions here are unlike those in an action upon a contract against a partnership or its members where the partnership is a recognized and admitted fact. Here the question of the partnership is one of the main contested issues.

Williams by his default, admitted all of the material allegations of the complaint, including the making of the note and his individual liability, which certainly entitled the plaintiff to a separate judgment against him in the full amount claimed and obtained, as distinct from the judgment against Richards, based upon the verdict which allowed no interest.

Section 866 of the Code of Civil Procedure of Alaska (Compiled Laws of Alaska of 1913) provides that

> "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff."

And Section 883 of the same Code contains a provision similar in its substance to Section 578 of the

Code of Civil Procedure of the State of California cited in the case of *Bailey Loan Co.* v. *Hall,* 110 Cal., p. 490, hereinafter referred to, to wit:

> ". . . Third—If all the defendants have been served, judgment may be taken against any or either of them *severally* when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone."

And Section 1067 provides that

> "Judgment may be given for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves,"

While Section 1068 says that

> "In an action against several defendants, the Court may in its discretion render judgment against one or more of them whenever a several judgment is proper, leaving the action to proceed against the others."

Counsel endeavor to make a distinction between the word several and separate but we fail to see wherein any difference in the two words can be drawn when used in this connection.

> "Several . . . (3) Pertaining to an individual only; not common to two or more; *separate;* as, their several wishes shall be met. *Law.* Individually and separately related; separable; as a joint and several note. . . . (6) Separated; apart from others. . . ."
>
> (*New Standard Dictionary.*)

While it is true that the judgment against Richards is also against the partnership, yet Richards as a member of the partnership would be severally liable for its indebtedness (conceding that he was a partner and *that the indebtedness was such as might have been entered into by Williams on behalf of the partnership*) as well as severally liable under the language of the note itself. The liability of the partnership under the note is several; that of Williams is also several. All their liabilities are at the same time joint. Therefore that portion of the judgment referring to the members of the partnership and to Richards cannot be held to be other than an expression of the individual liability of the partnership and the individual liability of Richards to pay the $3500 judgment and attorneys' fees in accordance with the prayer of the complaint. There is in addition the individual liability of Williams as set forth in a subsequent paragraph of the judgment based upon his admissions by defaulting. Otherwise we would have a judgment for joint liability as between the partnership (ostensibly composed of Richards and Williams) and Richards to pay this $3500 judgment and attorneys' fees, which would mean a three-quarter liability for Richards instead of a full liability for the whole, reading that provision of the judgment as we do, and also reading the provisions of the judgment in the light of the note and the legal conclusions arising out of the form of said note sued upon and the prayer of the complaint, to wit: "plaintiff prays judgment

"against defendants above named and *each* of them "and against the copartnership of Richards and Wil- "liams" (Tr., 7).

Bailey Loan Co. v. *Hall,* 110 Cal., 490.

In the case of *Sears* v. *McGrew,* 10 Oregon, construing statutes of the Oregon Code similar to those quoted above, the Supreme Court of Oregon say:

> "The complaint in this case as was said in *Decker* v. *Trelling, et al.,* 24 Wis., 613, sufficiently states the facts out of which the liability of the defendants arise, and although it was in form adapted to a recovery against all the makers of the note jointly, it was still so framed that a several judgment could properly be had upon it against one or more of them. It alleged that the defendants made their joint and several note in writing, which note was set out in *haec verba* and attended with suitable averments to show that the plaintiff was entitled to judgment. Now under the Sections above referred to, judgment may be entered against any one or more of several defendants, whenever a several action might have been brought or a several judgment upon the facts of the case would be proper and this is allowable irrespective of the character of the complaint, whether it alleges a joint or several liability. The true criterion being whether a separate action might have been maintained, and if it could a several and separate judgment is proper. . . . But if the action is upon a contract joint and several, a several judgment would be proper as the defendant might have been sued alone; therefore judgment might be rendered against one or more without waiting the final trial (*Hempy* v. *Ramson,* 33 Oh. St., 313 . . .).

"In *Hempy* v. *Ramson, supra,* the result reached by the Court was:

"'(1) That in an action against two or more defendants where it appears that a several judgment is proper, it may in the discretion of the Court, be taken against one or more, leaving the action to proceed as to the others. (2) That such separate judgment against one or more operates as a severance of the cause of action and after such judgment the issues made by the remaining defendants are to be heard and determined as if they had been sued alone. (3) On such final trial a judgment may be rendered against the remaining defendants for the whole or such part of, the cause of action as may be proved against him.' . . .

"The doctrine of merger and of the release of one of the makers of a note by taking judgment against the other, has no application to cases of this character under our Statute."

In the case of *Randall* v. *Hunter,* 69 Cal., 80, the Supreme Court of California was considering the question of who was an "adverse party" within the meaning of a section of the California Code of Civil Procedure requiring adverse parties to be served with a notice of appeal. The facts of the case are curiously like those of the case at bar in many respects, and we think serve to emphasize the fact of the separate or several judgment in this case.

In that case the plaintiff sued one Hunter and one Gill as partners on a promissory note signed "Gill & Hunter." Gill defaulted. Hunter set up an individual defense, alleging among other things execution of the note without his knowledge or consent, and

that it was not executed for the use and benefit of the firm.

A judgment was entered against both Gill on his default and Hunter on the verdict against him. Hunter alone took the appeal and did not notice Gill. Motion made to dismiss for failure to serve Gill as an adverse party.

The Court in denying the motion said, referring to Gill:

> ". . . the judgment appealed from was rendered against him by default. If the judgment as to Hunter is reversed, it would still stand unreversed as to Gill and therefore he would not be affected by a reversal. If the judgment is affirmed, the judgment appealed from would remain unchanged and manifestly Gill's interest would not be affected by the judgment of affirmance. Whatever modification might be made of the judgment rendered by the Court below, or whatever judgment might be here rendered, *the judgment by default would still remain against Gill.*
>
> "It is said that if the judgment is reversed another trial might result in a several judgment against Gill, whereas the judgment against him is now a joint judgment one against him and Hunter, and that he is interested in preserving the joint judgment against him and preventing a several judgment as to him. *But his default admits that he is bound severally as well as jointly. If on the trial which has taken place a verdict had passed in Hunter's favor, a judgment by default might have been entered against him (Gill) severally. A reversal of the judgment appealed from would not do away with this default. It would only affect the judgment as to Hunter. As long as the default stands whatever judgment is ren-*

dered here would not affect the judgment against Gill. In this view we do not think Gill was an adverse party upon whom notice of appeal should have been served."

See also the case of *Bailey Loan Co.* v. *Hall,* 110 Cal., 490, hereinbefore referred to.

The action there was brought upon certain promissory notes purporting to have been made to the plaintiff by "H. G. Hall & Sons," against the three defendants alleged to have constituted the partnership. Two defendants defaulted. The third answered denying that he was a member of the partnership at the time of the execution of the notes. Upon the trial judgment was rendered in favor of the plaintiff against the defaulting defendants and in favor of the defendant who answered the complaint. The defendants against whom the judgment was rendered appealed upon the ground that as the action was against three defendants on a partnership obligation, the Court was not authorized to enter a judgment by default against two only.

The Court cited the provision of the California Code of Civil Procedure (Section 578), similar to the Alaska statute, to the effect that "judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants," saying:

"The terms of this section do not limit the rule to actions in which the defendants have appeared and answered, but include as well those in which

some of the defendants have made default, the only limitation in such case being that found in Section 580 that the relief shall not exceed that which the plaintiff shall have demanded in the complaint."

Citing approvingly *Randall* v. *Hunter, supra,* then say further:

"The appellants herein having made default to the plaintiff's complaint thereby admitted the truth of the allegations and consented to a judgment giving to the plaintiff all the relief he had prayed for. They admitted that they were members of the partnership of 'H. G. Hall & Co.' and that the notes set out in the complaint had been executed to the plaintiff by that partnership. *These facts whether admitted by their default, or established by evidence at the trial, entitled the plaintiff to a judgment against them. It is immaterial to them that their co-defendant was able to show at the trial that he was not a member of the partnership, and thus to defeat the plaintiff's right of recovery. It was not necessary that the judgment should run against the appellants as co-partners. The notes upon which the action is brought are several as well as joint, and the prayer of the complaint is for a judgment 'against said defendants' for the amount of said notes. The court was thus authorized to enter a several judgment against the appellants and the judgment entered is in accordance with the prayer of the complaint."*

In conclusion upon this point we cite the case of

Winters v. *United States,* 207 U. S., 565-8, 52 L. Ed., 340.

That was a suit brought by the United States against

the appellants in the case and others to restrain them from conducting or maintaining dams on Milk River or preventing the waters of the river from flowing to the Fort Belknap Reservation. An interlocutory order was granted and affirmed by the Circuit Court of Appeals for the Ninth Circuit. Upon the return of the case to the Circuit Court an order was taken *pro confesso* against five of the defendants. The appellants filed a joint and several answer upon which and the bill a decree was entered making preliminary injunction permanent. An appeal by the defendants who had answered was taken to the Circuit Court of Appeals for this Circuit without joining therein the other five defendants. Upon appeal thereafter to the Supreme Court the contention was made that neither the Circuit Court of Appeals nor the Supreme Court had jurisdiction because the five defaulting defendants had such interest in the case and decree that they should have joined in the appeal or proceedings in severance taken. Said the Supreme Court in holding no merit in the contention:

> "The rule which requires the parties to a judgment or decree to join in an appeal or writ of error or be detached from the right by some proper proceeding, *or by their renunciation* is firmly established. But the rule only applies to joint judgments or decrees. In other words when the interest of a defendant is separate from that of other defendants he may appeal without them. Does the case at bar come within the rule? The bill does not distinguish the acts of the defendants, but it does not necessarily imply that there was

between them in the diversion of the waters of Milk River, concert of action or union of interest. The answer to the bill is joint and several, and in effect avers separate rights, interests and action on the part of the defendants. In other words whatever rights were asserted or admission of acts done by any one defendant had no dependence upon or relation to the acts of any other defendant in the appropriation or diversion of the water. If trespassers at all they were separate trespassers. Joinder in one suit did not necessarily identify them.

"Besides, the defendants other than appellants defaulted. A decree pro confesso was entered against them and thereafter according to equity rule 19, the cause was required to proceed ex parte and the matter of the bill decreed by the Court. Thomson v. *Wooster,* 114 U. S., 104, 29 L. Ed., 105, 5 Sup. Ct. Rep., 766. *The decree was in due course made absolute; and granting that it might have been appealed from by the defaulting defendants they would have been, as said in Thomson* v. *Wooster, absolutely barred and precluded from questioning its correctness unless on the face of the bill, it appeared manifest that it was erroneous and improperly granted.*

"Their rights therefore, were entirely different from those of the appellants; they were naked trespassers *and conceded by their default the rights of the United States and the Indians, and were in no position to resist the prayer of the bill. But the appellants justified by counter rights and submitted those rights for judgment. There is nothing therefore in common between appellants and the other defendants. The motion to dismiss is denied."*

We think this case is decisive of the question of the separateness of the judgment in this case. Williams

conceded by his default all the contentions of the bank, and was in no position to resist the prayer of the complaint. Richards on the contrary fought every material allegation of the complaint, and submitted his case for judgment. He could no more consistently have asked Williams to join in the writ than could Williams have consistently joined in it. Williams was bound by his default. If on the trial of the case the verdict had been rendered in favor of Richards on the question of the partnership and the making of the note, the result as to Williams would be no different. He had admitted by his default that he was bound jointly and *severally* and a several judgment could still have been entered up against him. If the judgment in this case were to be reversed Williams would still be bound in the full amount and interest and attorneys' fees prayed for in the complaint. If the judgment be affirmed it would remain unchanged as to Williams.

There is therefore nothing in common between Richards and Williams in this judgment, other than the joint judgment for costs, which would not require that Richards join or sever Williams or *vice versa.*

Higbee v. *Chadwick, supra.*

Second. It is well known that the reasons for requiring a severance where one of the parties fails to join in the appeal are that the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not

desire to have it reviewed, and that the appellate tribunal shall not be required to decide a second or third time the same question on the same record.

No such condition exists in this record as to cite the rule or require its enforcement. In the first place the defendant in error so far as Williams is concerned can enforce its default judgment now. Any action taken by this Court in the case on the merits cannot affect the right of the Bank in this respect. Even if this Court should reverse in favor of Richards the Bank would not be deterred from executing as to Williams. As was held in the case of *Winters* v. *United States, supra,* while Williams might have sued out a writ of error, yet he would be limited to showing "upon the face of the complaint it appeared manifest that it (the judgment) was erroneous and improperly granted."

We do not think any such contention could be successfully made as to the complaint herein. But the defendant Williams never had any intention to offer any defense to the action in the Court below. He never answered or appeared in any way until he came as we have shown voluntarily about 1,000 miles to act as a witness for the plaintiff in the case. We have filed on this motion his statement duly acknowledged that he had never had any intention to appeal from the decision of the lower Court, which renunciation takes this case outside of the rule ordinarily applicable on motions based on a failure to sever (*Winters* v. *United States, supra*). His whole atti-

tude throughout this litigation (beginning with his failure to answer the complaint) followed by his testifying for the plaintiff bank and against his co-defendant Richards, would be entirely inconsistent with any attempt to sue out a writ of error from the judgment complained of, even if by so doing he would not be bound by the limitation stated.

Williams was entirely indifferent. The record shows he had nothing. He made the note in controversy in his own and Richards' name, and he thought he had bound Richards (who had something) and whose property was attached. He had no personal defense to offer. Therefore he made none, but in order to avoid any complications with the Bank and the law because of his signing Richards' name without authority, ranged himself on the Bank's side and against his co-defendant. It is clear that Williams never intended to fight the action either in the court below or in this court and no one under the circumstances shown could have deemed it necessary (even if the judgment were admittedly joint) to ask him to join in an appeal from a judgment in the obtaining of which the record shows he was so active a participant.

From the facts and law it is apparent that it would have been futile for us to have invoked the provisions of Section 1005 of the Revised Statutes and ask that the writ of error be amended so as to include the name of the defendant Williams, even if it were a case where the Court would allow such procedure.

The reason for the exercise of the rule requiring notice and severance in order to avoid a multiplicity of appeals and to place the judgment creditor in a position to execute his judgment without delay, is absent in this case. The time had gone by for the suing out of another writ of error when the motion to dismiss was filed. The non-appealing defendant has filed his renunciation and waiver of right of appeal in this Court and nothing could be accomplished by the dismissal of the writ of error of Richards but a rank injustice.

We submit that the motion to dismiss be denied.

So far as the merits is concerned we do not think we can add anything further to our lengthy opening brief. For the reasons therein pointed out we ask a reversal of the judgment.

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